

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

UNITED STATES OF AMERICA)	Civil Action No. 5:10-cr-00028-1
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
ANDREA CHARLTON,)	By: Hon. Michael F. Urbanski
 Petitioner.)	 United States District Judge

Andrea Charlton, a federal prisoner proceeding pro se, filed a motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255, which is presently before the court for preliminary review, pursuant to Rule 4 of the Rules Governing § 2255 Proceedings. After reviewing the record, the court dismisses the motion because petitioner is not entitled to relief.

After pleading guilty and providing substantial assistance, the Honorable Samuel G. Wilson, a United States District Judge of this court, sentenced petitioner on October 29, 2004, to thirty-six months' incarceration and four years' supervised release for conspiring to distribute 50 grams or more of methamphetamine, in violation of 21 U.S.C. §§ 846 and 841(a)(1), and possessing a firearm in relation to that offense, in violation of 18 U.S.C. § 924(c). United States v. Charlton, No. 5:04-cr-30017-4 (W.D. Va. Oct. 29, 2004) (Wilson, J.). Petitioner violated the terms of supervised release, and on October 14, 2010, Judge Wilson sentenced petitioner to thirty more months' incarceration.

On December 14, 2010, petitioner pleaded guilty to conspiring to distribute 500 grams or more of methamphetamine, in violation of 21 U.S.C. § 846, and to two counts of distributing methamphetamine, in violation of 21 U.S.C. § 841(a)(1). United States v. Charlton, No. 5:10-cr-00028-1 (W.D. Va. Nov. 30, 2011) (Urbanski, J.). The court sentenced petitioner on November 30, 2011, to ninety-months' incarceration, which would run consecutively to the thirty-month sentence imposed by Judge Wilson.

In August 2012, petitioner filed a motion to vacate, set aside, or correct sentence, pursuant to 28 U.S.C. § 2255, in United States v. Charlton, No. 5:04-cr-30017, to challenge her 2004 criminal judgment entered by Judge Wilson. Judge Wilson determined that petitioner was also challenging the 2011 criminal judgment entered in this action, 5:10-cr-00028-1, and ordered the Clerk to docket the § 2255 motion in 5:10-cr-00028-1. The court subsequently advised petitioner that the court was construing the § 2255 motion as challenging the 2011 criminal judgment, pursuant to Castro v. United States, 540 U.S. 375 (2003), and granted petitioner the opportunity to object by September 26, 2012. Petitioner did not object, and the court now considers the merits of the motion.

Petitioner argues a single claim in the motion:

Under U.S. v. Simmons, a person is not a felon under West Virginia structured Sentencing unless they were actually facing a computed sentence of 12 months. [Petitioner]'s criminal history should be lower. Accordingly, the defendant was not at the time of the instant Federal case [sic]; therefore, her sentence should be vacated and she should be released from custody.

(§ 2255 Mot. (ECF no. 242) 4.)

Petitioner is not entitled to any relief via § 2255. Petitioner's criminal history calculation did not include a conviction from West Virginia, and petitioner was a felon as a result of her convictions in 5:04-cr-30017-4, which occurred prior to the "time of the instant Federal case." See Presentence Investigation Report (ECF no. 215) 8-10. Petitioner fails to describe how the imposed sentence violated the Constitution or laws of the United States, exceeded the maximum sentence authorized by law, or is otherwise subject to collateral attack. 28 U.S.C. § 2255(a). Accordingly, the court dismisses the § 2255 motion because it plainly appears from the motion and the record that petitioner is not entitled to relief. Based upon the court's finding that

petitioner has not made the requisite substantial showing of a denial of a constitutional right as required by 28 U.S.C. § 2253(c), a certificate of appealability is denied.

The Clerk is directed to send a copy of this Memorandum Opinion and the accompanying Order to petitioner and counsel of record for the United States.

Entered: November 2, 2012

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District Judge